In the Supreme Court of the United States

OCTOBER TERM, 1973

NO.

HARRY WALLACE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petitioner, Harry Wallace, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit in *United States of America* v. *Thomas Joyce, Burton Sherre, and Harry Wallace,* Nos. 73-1014-1016, was entered on May 9, 1974, but is not yet officially reported. It is printed as Appendix A to this Petition. (App. 1) The Petition for Rehearing, denied on June 4, 1974, is printed as Appendix B. (App. 30).

JURISDICTION

The judgment of the Court of Appeals affirming the conviction in the District Court was entered on May 9, 1974. A timely Petition for Rehearing was denied on June 4, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Where a non-admitted offshore surplus lines and excess insurance company grossly overstates its assets, employing that overstatement as a device for acquiring a broker (likewise engaged in high risk questionable-responsibility insurance) to obtain for it insurance business; and where the broker thereafter procures assureds; and where such broker retains as a fund 60% to 100% of collected premiums for the purpose of paying claims and expenses incident to claim adjustments relating to policies issued those assureds; and where a party to the original false overstatement of assets is also an attorney engaged in the actual adjustment of bona fide claims payable from that fund; and where such attorney requests payment of fees from the premium fund:

Then, does his letter of request to the broker-depositor of those funds for fees for adjustment services, consti-

tute a letter tending to further a scheme to defraud where the gravamen of the fraud consisted in misstatement of the insurance company's assets?

STATUTORY PROVISION INVOLVED

Title 18, United States Code, Section 1341

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the decision thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91-375, §6(j) (11), 84 Stat. 778.

STATEMENT OF THE CASE.

Harry Wallace was indicted with three co-defendants, Thomas Joyce, Burton Sherre, and Robert Ostrander in a fifteen count indictment, charging mail fraud in violation of 18 U.S.C. §1314. Count I recited the underlying scheme to defraud. All counts alleged a mailing in furtherance of the underlying scheme.

Not guilty verdicts, jury verdicts, successful motions for acquittal, and motions to dismiss left the defendant Wallace guilty of but one count, Count V, which was sustained on appeal.

Count V alleged Sherre sent a letter to an Ohio insurance broker, Paterson in furtherance of the scheme.

The scheme alleged in Count I, named as "victims", among others, Thomas H. Paterson and International Excess Agency, Inc., Paterson's brokerage company.

The scheme to defraud as alleged, consisted in the defendants' false portrayal of the assets of Global Surplus and Excess Ltd., a Bahaman insurance company owned by some of the defendants, by which they induced brokers and agents such as International Excess Agency, Inc. to believe that assets were available to protect Global policyholders, and thus induced such victims to engage in soliciting insurance customers.

Defendant Ostrander pled guilty and did not stand trial. Wallace, Joyce and Sherre were variously convicted on July 5, 1972 following trial by jury. Joyce and Wallace were found guilty of Count V, Sherre, not guilty. Thereafter the trial judge acquitted Joyce on Count V.

On review, the Court of Appeals, one judge dissenting, affirmed Wallace's conviction on Count V, the only count as to which Wallace was convicted. Wallace was the only

defendant ultimately found guilty of the Count V violation. The dissenting judge would have reversed as to Count V on the grounds that the count letter did not fall within the conversion scheme and that there was a failure of proof that Wallace was criminally responsible for the letter.

STATEMENT OF FACTS

For the purposes of this Petition, Petitioner Wallace does not contest the sufficiency of the proof of the underlying scheme.

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Government witness Thomas Patterson testified that he did business as International Excess Agency, Inc., Excess & Surplus Line Insurance Brokers (Tr. 818) in Ohio (Tr. 819). In the summer of 1965 he and his corporation arranged to do business with Global, of which Wallace was president (Tr. 821-830).

On November 30, 1965 his corporation was instructed by letter from defendant Sherre to deposit net premiums he collected in a Cleveland, Ohio account on behalf of Global (Government Exhibit 23, Tr. 831-832).

On December 8, 1965, defendant Wallace instructed Paterson by letter (Government Exhibit 24, Tr. 831-835) to disregard previous instructions concerning premium remittances. He directed Paterson to open an account at a bank of Paterson's choice in Ohio for deposit of 60% of premium funds emanating from Paterson's office, for the purpose of providing funds for "the payment of losses and related loss adjustment expenses arising from claims under policies of insurance effected by your office." That letter further instructed Paterson to remit the remaining 40% of net premium to Global's Miami, Florida office (Government Ex. 24, Tr. 831-835).

Paterson followed neither procedure. For several months he deposited the 60% in the account he opened in Cleveland and sent the remaining 40% to Miami. Thereafter, he stopped sending the 40% to Miami but continued to deposit the 60% in Cleveland (Tr. 837). That state of affairs came about when the Ohio Insurance Department instructed him in July of 1966 to cease writing new business with Global. Thereafter, Paterson got the count letter, dated December 31, 1966. (Government Ex. 28-A, Tr. 849-850)

Exhibit 28-A, the count letter, reads:

Burton Sherre
Attorney at Law
7019 W. Higgins Ave.
Chicago, Illinois 60656

SPring 4-1363

December 31, 1966

International Excess Agency, Inc.
1414 So. Green Road
Cleveland, Ohio 44121

Att: Mr. Tom Paterson

Dear Mr. Paterson:

Please be advised that Global Surplus and Excess Limited has authorized you to pay the two loss claims of Seminole Theatres, Inc., D/B/A Arrow Drive-In Theatre. Our share of the claim pertaining to the lightning damage is $1,479.60, but our responsibility, according to your note of November 22, 1966, is only ½, as Benelux shares the other ½. So our share, therefore, is $739.80. On the other claim, Business Interruption, our share of the loss is $380.42. Is Benelux supposed to share this loss also? I find no

indication in your notes one way or another. Please advise.

Tom Joyce tried to call you yesterday afternoon (Friday, Dec. 30), but unfortunately there was no answer. I am sure he will be in further contact with your office. We were in the law library working on matters pertaining to legal liability as it concerns many of the loss claims you submitted. Due to the fact that I have and am spending many hours on claims coming from your office, Tom Joyce, Harry Wallace and Bob Ostrander agree that some of the cost of my legal services should come from funds your office holds in behalf of Global Surplus and Excess Limited.

Accordingly, therefore, I would appreciate, all the above parties agreeing thereto, having you forward to me the sum of $1,000.00, covering legal services. As you well know I have innumerable claims lately and still have on my desk many more claims, not counting those matters in litigation. Frankly, it is through my efforts that some determination has been made. Further, I would like to advise you that I will soon be contacting Carvalho & Co. to make a similar request upon advice to the above parties.

Very truly yours,

/S/
Burton Sherre

S/a

The author of the count letter, Sherre, was a lawyer. No contentions were made that he did not do the work for which he sought compensation. Rather, Paterson testified, on December 27, 1966 he told Joyce that he had been instructed by the Ohio Insurance Department to keep Global funds in escrow, which he repeated January 5, 1967 in a telephone conversation with Sherre (Tr. 873-874, 877).

In setting aside Joyce's conviction under Count V, the trial judge concluded that Joyce neither knew nor should have foreseen that Sherre would write the letter (See Appendix C).

In denying relief to Wallace as to that count, the trial judge concluded he had erred in acquitting Joyce on Count V (See Appendix D).

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Following denial of the petition for rehearing, the trial judge reduced the sentence of one year he had previously imposed, to a sentence of 10 months.

REASONS FOR GRANTING THE WRIT

For the purposes of this petition, we will concede the victim's reliance on the defendants' false representations as to Global's financial condition.[1]

Petitioner Wallace was vicariously charged with transmitting a letter in furtherance of a scheme to defraud. The least that should be required, since intent is material to proof of the crime, is a plausible assertion that at the time of mailing the "schemers" themselves would have appreciated the felonious intent with which the letter was mailed.

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[1] Our concession is far from niggardly. The government's theory proposes that persons were misled by the falsification of Global's assets. This would actually be true only of those who do not read English, or do not understand it.

In the insurance industry high risk companies take the business that financially sound companies reject. The garbage, in short. "Surplus" and "excess" are, in this context, euphemisms for "scavenger." "Global Surplus and Excess, Ltd.," freely translates to "Global Offal and Detritus Processors, Ltd." The "victim" is none other than "International Excess Agency," whose very name likewise reveals its character. We know from the name alone, for example, that Paterson (International) is not in regular business contact with Hartford Fire.

Global was "non-admitted" anywhere in the United States. Where insurers are non-admitted, there is a reason for their non-admission. Always a financial reason. No money. The charter of an offshore non-admitted surplus company is offshore because if it were not it would be revoked.

Global, as a "surplus lines, non-admitted, offshore, excess" company was underfinanced by definition. Men simply do not put sub-

(Footnote continued)

The letter upon which Petitioner Wallace was convicted was written by one of the alleged schemers, a lawyer, seeking modest compensation for services he actually performed for the adjustment of bona fide loss claims.

The government did not claim a failure or refusal to pay losses caused by Global's insolvency. Indeed, the government never responded to a challenge that it do so (Tr. 1474-1475). The fraud delineated by the indictment and established by the proof consisted in misrepresenting as financially sound an insurance company which was financially shaky.

But the financial weakness of the company was not proposed, nor could it be, as evidence that the company was

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(Footnote continued)

stantial assets in "high risk" companies, or chuck-a-luck games. Financially responsible companies reject customers who are high wire acrobats, wildcat Gulf oil drillers and drivers with multiple drunk driving convictions. Such risks are called "substandard."

The "victim" (International) was in the excess business a number of years. We are supposed to assume that International swallowed whole the inviting financial representations of Global, a non-admitted, offshore, surplus *"and"* excess lines insurer. International compensated for its credulity by retaining the premiums paid by insureds. It retained the premiums in a bank of *its* choice, i.e., a bank in which International (not Global) dealt with the banker, i.e., International got the interest. The credulous "victim" kept one hand on the money.

An alternative view would suggest that Paterson of International knew exactly what he was dealing with because he could read and understand plain English. But then there would be no victim and no federal prosecution. Since a federal prosecution ensued, it follows that Paterson, whose business was surplus and excess, knew nothing about surplus and excess.

an insurance company in name only and did not in truth and in fact provide insurance protection for its assureds.

To the extent that Global issued policies, set up loss reserves in bank accounts, processed claims by or against assureds, adjusted those claims and paid them, that enterprise, however watered its assets, was not, in the enumerated particulars, engaged in a scheme to defraud.

The actual "fraud" which emerged from the evidence was the fraud of sailing under false financial colors. Global did not engage in the fraud of pretending to be an insurance company engaged in the insurance business when it was really a non-insurance company engaged in the theft business.

Now assuming that Global was as fragile financially as the government claimed, and we daresay that it was, it does not follow that in the conduct of its insurance business every use of the mails in which it engaged furthered the fraud. Indeed, to the extent that the schemers caused Global to process claims and pay losses, they did so in derogation of their scheme to defraud. For the payment of assureds' claims and payment of adjustment expenses left less money to be stolen by the schemers, if theft was their purpose (altough there was no evidence to that effect).

Whether one's view of criminal law enforcement be hardline or softline, neither view would propose that the dignity of a conviction is enhanced where justification of the conviction depends upon an absurdity. Such is the situation here. In its opinion (Appendix A, pages 8-9) the Court of Appeals sustained the count, stating, "With Wallace's and Joyce's consent, Sherre was attempting to obtain for himself funds that were segregated for the

benefit of policyholders' claims in Ohio. The letter thus falls within the conversion scheme alleged."

The dissenting judge had a different view (Appendix A, pages 25-26). Noting that the scheme alleged in the indictment referred to misrepresentations to brokers and state insurance agencies concerning the nature of assets held by Global, the dissent urged reversal, saying, "The scheme was not use of the mails to defraud by settling claims and seeking payment from retained premium to pay legal counsel." (App. A, 26).

In the government's view of mail fraud, and apparently in that of the Court of Appeals, if a business obtains customers by a false financial statement, everything that takes place thereafter in the conduct of that business is infected with the prior misrepresentation such that future conduct of the business, however legitimate, entails violation of the federal mail fraud statute every time a mailing occurs.

Observe what transpired here.

A broker made a deal with an insurance company, pursuant to which the broker was to retain the premiums he collected. Those funds constituted a loss reserve for the payment of both claims *and* expenses for the adjustment of those claims (Government Ex. 24, Tr. 831-835). Thereafter the lawyer who adjusted and settled a number of the claims mailed a letter. The letter instructed the broker to pay one such claim, and asked a modest fee for servicing a number of such claims.

According to the majority in the Court of Appeals, the letter furthered the scheme. That is to say, these schemers got together and dreamed up a clever plan whereby one of them could go to work for about a year, settling numerous insurance claims. Then, in implementation of his

original felonious intent to fool insurance brokers and public officials, he sought $1,000 in compensation for his services.[2] It became a federal crime when he sought that compensation by mail.

In *Parr* v. *United States,* 363 U.S. 370, this Court had ocasion to strike down a conviction for mail fraud predicated upon its earlier ruling in *Kann* v. *United States,* 323 U.S. 88, 95. In *Kann,* the court said:

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mail is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state laws."

Is it remotely conceivable that Wallace, had he reviewed the Sherre letter before Sherre sent it, might have mused, "Well, this letter certainly does help us execute our fraudulent intent to misrepresent our assets to brokers, agents, government agencies, and insurance companies."

The use of the mail as alleged in Count V was no more significant in the execution of a scheme to defraud than a letter sent out to pay Global's electric bill. An argument could be made that Global could not carry on its affairs if it had no electricity to operate its office typewriters, and that, accordingly, payment of the bill fur-

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[2] Sherre, a lawyer, emerges as an insurance adjustor. He brought four cartons of insurance claim files to court. If the count letter were from a lawyer, it might have read, "Services, legal, 1/1/65-1/1/66, $1,000." Instead, this financial buccaneer whimpers that he has got approval from everyone in the company to pay him the princely sum of $1,000 to process four *cartons* of claim files. The only detail missing from his letter is an explanation that he needs the money because his wife is pregnant for the fifth time. The jury was not heartless, acquitting Sherre of the count.

thered the scheme. There is nothing wrong with the argument, aside from the fact that it is infantile. Could the Congress, in enacting the mail fraud statute, have had this kind of mail use in mind?

Apparently in the present state of the law, something is or is not a fraudulent use of the mails depending upon the resourcefulness of the prosecution in generating far-fetched theories of criminal responsibility. This phenomenon prospers in the absence of any objective criteria supplied by this or any other court by which the matter may be judged.

While it would be presumptuous to suggest what such criteria might be, we would offer that at the very least, an objective observer reviewing the event, should be able to say, "that letter tends to further the commission of a fraud." If the letter tends to provide a claimant with whatever the claimant has a legal right to demand, and where the writer of the letter seeks reasonable compensation for having performed services for the claimant from a fund set up for that purpose, to call the activity "mail fraud" is itself deceitful. It is deceitful because it is obvious that the underlying purpose in calling such a letter "a letter in furtherance of a scheme to defraud" is nothing more than a transparent means of speciously subjecting the transaction to federal criminal jurisdiction.

Either the mail fraud statute is a statute which is calculated to sanitize the mails, in which the federal government has a colorable interest, or it is a shabby pretense for asserting federal jurisdiction over matters in which there is no legitimate *federal* interest. The holding in this case strongly suggests that the latter evaluation is closer to reality than the former.

Sherre, the author of the Count V letter, and the only one who sought to profit from its transmission, was acquitted on the count. In its opinion (App. A, pp. 9-10) the Court of Appeals justified the conviction of Wallace and the seemingly inconsistent acquittal of Sherre on the theory that Wallace was Sherre's co-conspirator (although no conspiracy was alleged) and that Sherre had been convicted of other counts (although Wallace was not) thus cementing a conspiratorial agency relationship between the two of them so that Wallace was vicariously liable for Sherre's letter, whether or not Sherre was.

This is an interesting extension of conspiratorial liability. In its simple application here: Sherre did nothing wrong in writing and sending the letter. But Wallace did something wrong in agreeing that Sherre could do something that it was not wrong for Sherre to do.

The court justified this in its original opinion on conspiracy principles. But in its ruling on Wallace's Petition for Rehearing, the court held that the conspiracy principle that a man cannot be guilty of a conspiracy where his alleged co-conspirator is acquitted did not apply to Count V, because Count V alleged a substantive offense, not a conspiracy, and inconsistent verdicts are permitted. (App. B, p. 31). The rule seems to emerge that conspiracy law applies to mail fraud where it permits conviction, but does not apply where its application would require reversal. Either that, or that Count V is a substantive count and it is not a substantive count.

While we tolerate a certain amount of contradiction in the law, we are unaware of any case save this in which it has been regarded with benediction.

The holding in the Court of Appeals as to Petitioner Wallace clears the way for the federal government to

prosecute local bucket-shop operators who pay their telephone bills by mail. It is safe to predict that the lore available in the opinion below will, unless rectified by this Court, generate future prosecutions entailing tangential use of the mail, and future petitions for certiorari to this Court complaining of federal encroachment upon areas reserved to the states.

The casual employment here of contradictory conspiracy law principles suggests an entirely new use for that body of law. It can proudly take its place with "Catch 22" as a device for superceding any claim whatever which is rooted in legal principle. Conspiracy law is thus not law. Like "Catch 22," it is the abrogation of law. For there cannot be a *legal* principle which, when we wish to call it forth, vitiates all legal principle. Such a principle would vitiate itself.

CONCLUSION

Wherefore, this Petition respectfully prays the Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, to the end that this case be reviewed and the conviction reversed.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner,
Harry Wallace